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NO. 87-1631

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DR. JACQULYN DIGGS,

Petitioner

v.

HARRIS HOSPITAL-METHODIST, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the application of 42 U.S.C. §2000e, et seq., extends beyond the traditional employer-employee relationship and prohibits discrimination by anyone having control over one's access to a job market.

II. If a traditional "employment" relationship is required to establish standing of a plaintiff under 42 U.S.C. §2000e, et seq., what test should be applied as a standard for determining whether or not an employment relationship exists, to-wit: economic realities, common law control, or a combination of both.

III. Whether plaintiff below met her burden to establish standing to assert a claim for relief under 42 U.S.C. §2000e, et seq.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

NO. 87-1631

DR. JACQULYN DIGGS, Petitioner

v.

HARRIS HOSPITAL-METHODIST, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. Jacqulyn Diggs, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on June 21, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose

judgment is herein sought to be reviewed, is unreported and is reprinted in the separate Appendix to this petition, page 1. The Memorandum Opinion and Judgment of the United States District Court for the Northern District of Texas, Fort Worth Division, are also reprinted in the Appendix, pages 21 and 20, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 21, 1988. A petition for rehearing was not filed. A copy of the Court's Judgment of June 21, 1988, is reprinted in the Appendix to this petition, page 1. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1). Also, the judgment of the Court of Appeals for the Fifth Circuit conflicts with judgments of other Circuit Courts which have addressed substantially the same questions set forth below.

QUESTIONS PRESENTED

I. Whether the application of 42 U.S.C. §2000e, et seq., extends beyond the traditional employer-employee relationship and prohibits discrimination by anyone having control over one's access to a job market.

II. If a traditional "employment" relationship is required to establish standing of a plaintiff under 42 U.S.C. §2000e, et seq., what test should be applied as a standard for determining whether or not an employment relationship exists, to-wit: economic realities, common law control, or a combination of both.

III. Whether plaintiff below met her burden to establish standing to assert a claim for relief under 42 U.S.C. §2000e, et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. §2000e, et seq., which provides as follows: "It

shall be an unlawful employment practice for an employer . . . to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, sex, . . ." and "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made in an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title."

STATEMENT OF THE CASE

This is a civil rights action brought by Dr. Jacqulyn Diggs, whose medical staff privileges were permanently suspended by the defendant private hospital. Dr. Diggs

brought her original complaint in Civil Action No. CA4-85-557-E, in the United States District Court for the Northern District of Texas, Fort Worth Division, on August 21, 1985. The complaint alleged that defendant, in terminating her medical staff privileges, had discriminated against her in violation of 42 U.S.C. §2000e, et seq. More specifically, plaintiff alleged that defendant discriminated on the basis of her race, sex, and/or in retaliation of a prior charge of discrimination that had been filed by her.

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Trial was to the court on January 26, 1987. The court signed its Memorandum Opinion on the 20th day of July, 1987, and entered judgment on the same date. Judgment denied all relief sought by plaintiff.

Plaintiff timely perfected an appeal from the trial court's judgment to the United States Court of Appeals for the Fifth Circuit. The court of appeals affirmed the trial court's judgment holding that: (1) in order to having standing to assert a claim under 42 U.S.C. §2000e, plaintiff was required to establish that a traditional "employment" relationship existed between her and the defendant or some third party, which relationship was protected under the law, (2) that a "hybrid" test of the economic realities and common law control test should be applied to determine whether plaintiff had a traditional "employment" relationship or whether plaintiff was an independent contractor, (3) that the evidence presented in the trial court failed to meet the standard of the "hybrid" test and, therefore, plaintiff had no standing to

assert a cause of action under 42 U.S.C. §2000e.

B. STATEMENT OF THE EVIDENCE

Plaintiff, Dr. Jacqulyn Diggs, is an adult, Negro female, licensed to practice medicine in the State of Texas and in Tarrant County. Plaintiff specializes in obstetrical and gynecological medicine. Harris Hospital-Methodist, Inc. is a privately owned and operated hospital, which employs in excess of fifteen (15) employees.

In July of 1981, plaintiff was granted the temporary privilege to practice at defendant hospital; and in September of 1981, she was granted the privilege to practice as a "provisional" staff member of the hospital. As a member of the "provisional" staff, plaintiff was allowed to admit patients to the hospital and to treat those patients who required

obstetrical or gynecological care. In order to secure the "provisional" staff membership, plaintiff was required to submit an application, along with the recommendation of three physicians who were privileged to practice at defendant hospital. Defendant hospital also maintained a list of physicians who were privileged at the hospital and who could serve as "sponsors" during the staff member's provisional period. Plaintiff was required to secure the agreement of three such sponsors to qualify for membership on the "provisional" staff.

During the provisional staff period, the physicians' sponsors were to "observe the provisional members operations for a sufficient period of time to become satisfied of his (sic) competence" and in the case of obstetrics, a sponsor was required to "be present

during the first twelve (12) deliveries." In plaintiff's case, the hospital staff and the sponsors were further instructed that there would be a special stipulation that plaintiff's sponsors were to "scrub" with plaintiff in all surgical cases as opposed to merely "observing" her work.

During the provisional staff period, the defendant hospital, according to its Bylaws and Rules, was to have evaluated and reviewed the performance of each physician on its professional staff at the end of each six-month period. Further, each physician sponsor was to evaluate the performance of the physician and make recommendations concerning plaintiff's promotion from provisional to active staff.

In July of 1982, following the first review of plaintiff's cases by the OB-GYN Quality Assurance Committee, the Committee recommended that plaintiff's privileges be

terminated because a sponsor did not "scrub" with her in one of her cases. The minutes of the committee reflect that plaintiff had been told that her sponsors were to "scrub" with her; however, hospital records verify that plaintiff had not been advised of this special requirement.

Plaintiff was not advised of the recommendation to terminate her privileges until the Credentials Committee and the Medical Board had met and concurred in the recommendation. However, in August of 1982, the Medical Board reassessed its decision and decided that plaintiff should be retained on the Provisional Staff. The OB-GYN Quality Assurance Committee was informed of this fact in August of 1982.

Shortly thereafter, the Chairman of the OB-GYN Quality Assurance Committee called a special meeting of the committee to review the care and treatment by

plaintiff to her patients. At the specially called meeting, the committee reviewed the chart of each individual patient treated by plaintiff from July of 1981 to the date of the meeting; the Committee raised questions in three cases reviewed. Based on these questions, the committee again recommended termination of plaintiff's privileges. Again, despite provisional staff rules to the contrary, plaintiff was not advised of the OB-GYN Quality Assurance Committee's recommendation until it had again passed through the Medical Board.

Plaintiff requested a hearing before the Medical Board, and the request was granted. Two of her sponsors appeared in support of her at the hearing. All three cases were discussed by the Board, the sponsors and plaintiff. During the discussion, the Chief of her division, Dr.

Abbott, specifically agreed that the care rendered by her was appropriate in one of the cases questioned. Thereafter, the Medical Board rejected the Quality Assurance Committee's recommendation; but despite the fact that one of her sponsors appearing at the hearing unequivocally recommended promotion to active staff, the Medical Board decided to retain plaintiff on the provisional staff. Further, the Medical Board required plaintiff to secure additional medical education and to continue to have sponsors present during obstetrical cases and to have a sponsor actually scrub in for surgical cases. This decision was made in October of 1982.

When the OB-GYN Quality Assurance Committee was advised of the Medical Board's decision, the committee decided to review each and every one of plaintiff's cases on a quarterly basis. During its

first quarterly review in February of 1983, the committee raised a question about one of plaintiff's cases; and plaintiff responded to the question addressed to her. No further question was communicated to plaintiff.

In July of 1983, another review of plaintiff's individual patient records from February through June of 1983 was conducted. A question was raised about one surgical case; however, the committee expressly found that the care rendered to the other patients treated by plaintiff during that time period was appropriate.

In May of 1983, plaintiff had been notified that the Credentials Committee was going to hold a "six month review" of plaintiff's provisional privileges; however plaintiff received no further information about the review in June, July, or in August of 1983.

On September 1, 1983, plaintiff, along with three other black physicians, filed complaints with the Office of Civil Rights alleging that defendant hospital engaged in discriminatory practices and procedures. In essence, the complaints focused on the fact that no black physicians were participating on committees involved in the peer review process, that black physicians were being more carefully scrutinized than their white counterparts, that the unequal scrutiny and lack of representation had negatively impacted black physicians' ability to obtain and retain medical staff privileges. Plaintiff's complaint was also based on the fact that black physicians were not promoted from provisional to active staff as quickly as their nonminority counterparts, and that black physicians were more closely scrutinized

during the provisional staff period than were nonminority physicians.

After the filing of the complaint, Mr. Reby Carey, a State Legislator from Tarrant County, arranged a meeting between black physicians and representatives of Harris Hospital. The purpose of the meeting was to allow black physicians to voice their complaints about the practices at the hospital. After the complaints were addressed to representatives of the hospital, including the Administrator and Chairman of the Trustees, hospital officials indicated their desire to work with the physicians to resolve any problems that did exist. Furthermore, a few black physicians were added to existing staff committees. In reliance on the statements of the hospital representatives and in view of the appointments to committees, the four

physicians withdrew their complaints against the hospital.

Plaintiff's complaint to the Justice Department was received by the hospital on September 7, 1983. In October of 1983, plaintiff had still received no feedback concerning the review that was to have been conducted shortly after May of 1983. On October 4, 1983, plaintiff submitted a letter requesting promotion to active staff of defendant hospital. At or about the same time, the OB-GYN Quality Assurance Committee set about to review all of the records of patients treated by plaintiff during the period of time that she had been privileged to practice at the hospital. A complete review of individual patients treated by plaintiff had previously been conducted through July of 1983, as follows: (1) review of individual patients treated prior to August of 1982,

(2) February of 1983, review of patients treated between August of 1982 and February of 1983, (3) July of 1983, review of patients treated between February and July of 1983. The record reflects that prior to July of 1983, four of plaintiff's cases had been questioned, and in July of 1983, one additional case was questioned. However, in re-reviewing plaintiff's records in October of 1983, following plaintiff's complaint to the Justice Department in September, the committee raised questions about 16 patient records, only two of which had been treated following the last review in July of 1983. Dr. James Watts, Chairman of the OB-GYN Quality Assurance Committee, testified that OB-GYN Quality Assurance Committee, had periodically reviewed the records of patients treated by plaintiff, that the review had involved examination of each individual chart of the patients, and

that the same criteria should have been applied in the October review that had been previously been applied in all prior reviews. Dr. Watts also testified that the criteria used by the committee were objective, and that all members of the committee understood the criteria and applied them reliably. Finally, Dr. Watts testified that if the same criteria had been applied to the same cases, he would expect the conclusions about the cases to be the same in October as in prior reviews, and he was unable to explain why only five cases had been questioned prior to the review in October of 1983, one of which did not appear in the list of 16 cases questioned in October of 1983, whereas, in October, a total of 16 cases were questioned upon re-review.

Based on the October review, the OB-GYN Quality Assurance Committee

recommended termination of plaintiff's privileges. Plaintiff was afforded an opportunity to respond to the questions raised by the committee, and she did respond and appeared at the meeting of the committee. Nonetheless, the committee continued to recommend termination. Subsequently, plaintiff met with the Credentials Committee which also recommended termination, and plaintiff appeared in a hearing before the Medical Board which recommended termination as well. The Board of Trustees accepted recommendation of the Medical Board, and plaintiff's privileges were terminated effective September, 1984. Plaintiff was not allowed to appear before the Board of Trustees.

At the time of trial, three of the physicians who had filed complaints with the Office of Civil Rights were no longer

practicing at defendant hospital. The privileges of plaintiff had been terminated involuntarily. The privileges of a second physician, Dr. William E. Garrett, a Board Certified General Surgeon who had practiced on the active staff of the hospital for five years prior to the filing of his complaint, had been limited so that (1) he was required to have another physician consultant associated in the treatment of all of his patients who were required to be admitted to the intensive care unit (a common occurrence in surgical cases), and (2) he was not allowed to take any patients who were admitted through the emergency room unless he associated another physician to consult during hospitalization of the patient. In other words, no referrals came to him through the emergency room as had previously been the rule. These restrictions had been imposed

involuntarily. The third physician, Dr. Byrd, a witness before the court, testified that he had voluntarily terminated his relationship with defendant hospital, but only after a hospital committee had recommended that his privileges be limited in a manner similar to the limitations placed on Dr. Garrett. Dr. Byrd had been a member of the active staff of defendant hospital prior to his termination for about ten years.

Following termination of her privileges to practice at defendant hospital, plaintiff was unable to maintain her privilege to practice at other hospitals in Tarrant County. For a brief period, she was privileged to practice at a suburban hospital, but when the hospital closed its obstetrics division, and since that time, plaintiff has not been able to secure privileges at any other hospital.

Therefore, she has been totally unable to treat obstetrical patients; and her ability to practice gynecological surgery has been significantly reduced. Dr. Garrett testified at trial that the same thing had happened to him. As soon as his privileges were limited at Harris Hospital, he lost his privileges at other hospitals based on the Harris action. Dr. Byrd, recognizing that he would lose his privileges at other hospitals in Tarrant County, moved to another Texas city and no longer practiced in Tarrant County at the time of trial.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT PLAINTIFF DOES NOT HAVE STANDING TO ASSERT A TITLE VII ACTION AGAINST DEFENDANT HOSPITAL FOR THE REASON THAT: (1) THE COURT OF APPEALS ERRONEOUSLY LIMITED THE APPLICATION OF TITLE VII TO SITUATIONS INVOLVING A TRADITIONAL AND SPECIFIC "EMPLOYMENT" RELATIONSHIP BETWEEN A PLAINTIFF AND DEFENDANT OR THIRD PARTY ; (2) THE COURT OF APPEALS APPLIED AN OVERLY RESTRICTIVE TEST IN DETERMINING WHETHER OR NOT PLAINTIFF HAS STANDING UNDER TITLE VII; AND (3) THE COURT OF APPEALS ERRED IN APPLYING THE TEST AND IN HOLDING THAT THE

PLAINTIFF FAILED TO PRODUCE EVIDENCE ESTABLISHING STANDING TO ASSERT A CLAIM FOR RELIEF UNDER TITLE VII.

All courts accept the premise that the language of Title VII is broad and should be liberally interpreted. Further, it is universally accepted that Title VII is not only designed to eliminate discrimination in hiring, firing and promotional decisions, but is also intended to eliminate discriminatory practices which impact access to employment opportunities. This application of Title VII is based on 42 U.S.C. §2000e-2 which provides that:

> "(a) It shall be an unlawful employment practice for an employer . . . (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C. §2000e-2(a)(1), emphasis added).

Early in the legal history of Title VII, courts began to recognize that a Title VII plaintiff need not establish an

existing or potential formal employment relationship with the defendant in order to have standing to sue under Title VII. Instead, it was sufficient for the plaintiff to assert that the defendant significantly affected or controlled the plaintiff's access to employment opportunities in a discriminatory manner. This rule was first enunciated in Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1970). The Sibley Rule has been consistently utilized in order to give Title VII a broad application in keeping with the objectives of Congress. Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (D.N.H. - 1974); Pao v. Holy Redeemer Hospital, 547 F.Supp. 484 (E.D. Penn. - 1982); Gomez v. Alexian Brothers Hospital of San Jose, 698 F.2d 1019 (9th Cir. 1983); Doe, Ex Rel v. St. Joseph's Hospital,

788 F.2d 411 (7th Cir. 1986); Pardazi v. Cullman Medical Center, 838 F.2d 1155 (11th Cir. 1988); Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988); Mitchell v. Frank R. Howard Memorial Hospital, No. 87-1913, 87-2069 (9th Cir., August 9, 1988, slip opinion).

In the case at bar, the district court held that "in order for Diggs to recover under this Federal Enactment (referring to 42 U.S.C. §2000e, et seq.), she must be an 'employee' of Harris Hospital as defined by 42 U.S.C. §2000(e)(f) or an applicant for employment of Harris Hospital." Based on this ruling, the court held that "Diggs is not an employee of Harris Hospital and, therefore, does not have a cause of action under Title VII." In limiting Title VII's application to "employee" of defendant, and disregarding the broader application of

Title VII, the district court clearly erred.

Without finding the district court's determination erroneous, the circuit court recognized that other courts have held that Title VII might be violated by interfering with a plaintiff's relationship with a third party. However, the circuit court held that the third-party relationship must be one of "employment" in the traditional sense, and that a physician's relationship with his or her patients could never qualify as a third-party relationship sufficient to invoke the protection of Title VII. In the words of the circuit court:

> "Under the above test, Diggs' relationship with her patients is decidedly not one of employment. Her patients did not control the manner and means of her professional treatment. A physician's work involves considerable skill. Further, patients do not furnish the equipment, instruments, supplies, and support staff used in a physician's rendition of

> medical care. Payment is for services rendered, not on-going compensation. Additionally, a physician provides care for numerous patients within a short period of time."

This decision of the Fifth Circuit Court is clearly inopposite to the decisions of other courts. See Doe v. St. Joseph's Hospital of Fort Wayne, cited supra, (Seventh Circuit), and Mitchell v. Frank R. Howard Memorial Hospital, cited supra, (Ninth Circuit).

Title VII was clearly intended to reach "professionals", as well as less-skilled individuals. The relationship between the intended scope of Title VII and the instant case is most clearly shown by the legislative history of the 1972 amendment to Title VII. See 118 Cong. Rec. 1463-64, 1647. An amendment proposed at that time was designed to exclude from Title VII physicians and surgeons employed by public or private hospitals. In the

course of Senate debate over the proposed exclusion, Senator William said:

> "As I stand here leading the debate on this measure, I try to think as a young person who has gone through that long, hard and expensive trail to be the graduate of a medical school, be he man or woman, black or white, or whatever national ancestry. I say that in this Nation, which so badly needs doctors, it would be a terrible crime if, because of ethnic background, sex, or religion, the American people were denied the services of the new doctor.
>
> "That is exactly what this amendment would do. It would take from a doctor the protection that the Constitution gives him and would protect through this law. I think it would be against all this country holds itself up to be, in an area of one of our greatest needs." 118 Cong. Rec. 1647, emphasis added.

In the same debate, Senator Javits stated:

> "One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditch digging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.

> "Yet, this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them. 118 Cong. Rec. 1463-64, emphasis added.

The proposed exclusion of physicians and surgeons was defeated; and this Court, in addition to all lower courts, has stated that little distinction should exist between professional and non-professional job situations, and that discriminatory practices in professional fields are not immune from attack. Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed2d 59, 104 S.Ct. 2229 (1984).

The primary reason cited by the Fifth Circuit for holding that a physician similarly situated to Dr. Diggs could not be protected by Title VII was that "her patients did not control the manner and means of her professional treatment. A physician's work involves considerable skill." In essence, the court's holding accomplishes defacto what Congress attempted to eliminate in refusing to enact an amendment to Title VII that would exclude physicians and surgeons from coverage of the act.

In determining that plaintiff did not have standing to assert a Title VII cause of action, both the district court and the circuit court held that plaintiff could not be deemed to be an "employee" of defendant hospital, but rather was an "independent contractor" under the law. This distinction has been made in the case law

interpreting Title VII rather consistently; however, the federal courts have adopted different standards for determining who is deemed an "employee" for the purposes of Title VII. In most cases, courts have interpreted the term "employee" broadly, using the "economic realities" test. See Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987), cert. den., 108 S.Ct. 503 (1987); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979); Mitchell v. Frank R. Howard Memorial Hospital, cited supra. Even though some individuals have not been deemed "employees" in the common law agency sense, those individuals have been afforded a cause of action under Title VII because Title VII was intended to protect any individual from discrimination affecting job opportunities. See Mitchell, id. at 8-10.

The "economic realities" test was first approved by the Supreme Court in 1947 in an attempt to interpret who was an "employee" for the purposes of the Fair Labor Standards Act and the Social Security Acts. On June 16, 1947, the Supreme Court decided both United States v. Silk, 331 U.S. 704 (1947), and Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). Both cases turned on whether the "employee" was actually an independent contractor and, therefore, not a proper plaintiff. In Rutherford, the totality of the circumstances were evaluated by the Court of Appeals, and it was concluded that the workers were "employees" based on the "underlying economic realities". Walling v. Rutherford Food Corp., 156 F.2d 513, 516-517 (10th Cir. 1946). In Silk, the Supreme Court again set forth the "economic realities" test in determining that certain

workers were "employees", not independent contractors, in construing social security legislation.

Citing N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944), the Supreme Court stated that a court is not free to determine employer/ employee relationships without regard to the provisions of the legislation sought to be enforced. Silk, 331 U.S. at 713-14. Additionally, other factors were recognized as helpful in determining whether an individual is an "employee" of the employer. These factors included the employer's right to discharge the employee, and the furnishing of tools and a place to work. Silk, 331 U.S. at 715-16 n. 8. In Bartels v. Birmingham, 332 U.S. 126 (1947), the Supreme Court recognized additional factors to be considered in determining whether an individual is an

"employee". These factors included the permancy of the work relationship, the skill required, and the opportunity for the employer to profit from the work of the"employee". Bartels, 331 U.S. at 128.

Basically three tests have been applied by various Federal courts in distinguishing a plaintiff's status as an "employee" versus an "independent contractor" for purposes of deciding standing to assert a claim under Title VII: (1) the "economic realities test" as described above (Lutcher v. Musicians Union Local 47, 633 F.2d 880, 9th Cir.--1980); the "common law agency test" which emphasizes the question of control over not only the result to be accomplished but also the details and means by which the result is accomplished (Smith v. Dutra Trucking Company, 410 F. Supp. 513, N.D.

Cal.--1976); and a "hybrid test" which requires an analysis of both the economic realities and the right of control of the defendant (Hickey v. Arkla Industries, Inc., 699 F.2d 748, 5th Cir.--1983; Mares v. Marsh, 777 F.2d 1066, 5th Cir.--1985). However, regardless of the test applied, most federal courts continue to pay homage to the "economic realities" of the situation as being significant factors in the determination of whether or not an individual is an "employee" for purposes of protection under Title VII. See Wheeler v. Hurdman, cited supra; Lutcher v. Musicians Union Local 47, cited supra; and Mitchell v. Frank R. Howard Memorial Hospital, cited supra.

If the "economic realities" test were properly applied to the totality of the facts in plaintiff's case, the plaintiff would definitely be deemed an "employee" of

Defendant hospital for the purposes of Title VII. Although the plaintiff was not compensated by the hospital, nor did she receive benefits such as retirement or vacation from the hospital, she was totally dependent upon hospital facilities to treat patients, and termination of her staff privileges at the hospital precluded her continuing to treat patients. The hospital furnished the facilities, equipment and support staff necessary for the treatment of her patients. Further, in treating the patients, the plaintiff performed functions that were part of the hospital's daily services and operations. The hospital obviously profited from the efforts of plaintiff in that the hospital received all of its income from patients who were admitted by its privileged medical staff members. The evidence below showed that no physicians were compensated by the hospital

or received benefits, such as retirement or vacation, from the hospital. Nonetheless, it is obvious that the hospital could not have continued in business had not physicians been available to provide medical treatment to the patients hospitalized in defendant's facility. Basically, the vast majority of hospitals have devised a scheme whereby the staff of physicians are paid directly by the respective patients rather than by the hospital; however, the physician staff is selected by the hospital, organized by the hospital board of trustees, appointed by the board, reviewed by the board, and discharged by the board. Indeed, the only difference between a hospital which operates with a "paid" physician staff and a hospital which operates with an "unpaid" physician staff is just that--payment. The "unpaid" staff of defendant hospital

provides all of the administrative services that would be provided by a "paid" staff, treats patients as would a "paid" staff, and confers benefits on the hospital as would a "paid" staff. The undisputed testimony below was that no patient could be admitted to the hospital except by a medical staff member who was "privileged" to practice approving the admission. If a patient presented at the emergency room, the patient was referred by the hospital to a privileged physician and that physician would then authorize admission. Thus, without the unpaid medical staff of defendant hospital, the hospital would have had to "hire" a medical staff or the hospital could not continue to do business because the hospital would not have any patients to whom services would be provided.

Further, the undisputed evidence in this case established the following "indicia" of employment: (1) plaintiff had to make "application" for the privilege to practice at defendant hospital, (2) plaintiff's application had to be supported by three "letters of recommendation", (3) plaintiff had to secure the agreement of three physicians to serve as sponsors, who were charged with the responsibility of "observing", first-hand, the treatment rendered by her to each patient in delivery or surgery, (4) plaintiff's performance was reviewed periodically, (5) initially, each physician was required to serve a "probationary" trial period wherein performance was evaluated on a case-by-case basis, (6) continuation of privileges was dependent on the "evaluation" of plaintiff's performance, (7) paid hospital staff (i.e., nurses, etc.) also monitored

plaintiff's performance and made reports to the Sectional Quality Assurance Committee who evaluated plaintiff's performance, (8) "promotion" was dependent on performance evaluations by a committee and by the sponsors (i.e. "supervisors"), (9) the medical staff could and did impose requirements on a physician for continuation of staff privileges, e.g. plaintiff was required to attend additional medical education courses and Dr. Garrett was required to employ a consulting physician for each patient treated by him in the intensive care unit and for any of "his" patients who were admitted to the hospital through the emergency room, and (10) the hospital furnished the facilities, the equipment, and the staff used by the plaintiff in delivering medical care to the patient. If the paid hospital assisting staff had a question about treatment of a

patient, the hospital staff would and did , contact another physician for advice while treatment was being rendered to a patient by plaintiff. In other words, the sponsor and other physicians not only "observed" and evaluated the treatment by provisional staff members, but they might also be asked by a paid employee of the hospital to intervene during a procedure; thus sponsors did indeed take an active part in providing care to plaintiff's patients and therefore functioned as "consultants and as supervisors" as opposed to a mere "observers."

The district court below based its finding that plaintiff was not an employee of defendant hospital on the fact that: (1) she was a "voluntary" probational staff member; she had a practice outside of the hospital, and only came to the hospital to perform tasks she "cannot" perform at her

office, that she was not required to admit patients to Harris instead of another hospital; and because she was not paid by defendant hospital, nor did she receive benefits from the hospital. It is elementary that all employment is "voluntary" and any employee accepts and continues employment voluntarily, is always free to work for any other employer, and may work part-time and flexible hours; thus, these facts are not determinative or persuasive. While compensation and benefits are factors to be considered, they too are not solely determinative.

The appellate court determined that plaintiff could not be an employee of defendant hospital for purposes of Title VII because the hospital did not direct the manner or means by which plaintiff rendered medical care, that she provided treatment without direct supervision, that a sponsor

was required only to attest to her qualifications, not to direct the details of the exercise of her skill; the hospital did not provide salary or wages to physicians with staff privileges, nor did it pay their licensing fees, professional dues, insurances, taxes, or retirement benefits; plaintiff had the right to practice at other hospitals during the time she was on the staff of defendant hospital; that there was no evidence submitted at trial that her privileges at Harris Hospital were necessary to her practice or that denial of staff privileges at Harris Hospital hampered her ability to obtain staff privileges at any other Fort Worth hospital. Some of these findings are clearly erroneous.

First of all, there was considerable evidence that termination of plaintiff's privileges hampered her ability to obtain

staff privileges at all other Fort Worth hospitals. The same evidence existed for Dr. Garrett. Further, Dr. Byrd testified that this situation existed frequently for physicians who were discharged in Tarrant County. Specifically, Plaintiff testified that at the time of the termination of her privileges she had "courtesy" staff privileges at Huguley hospital, another Tarrant County hospital with an obstetrical unit; that in order to maintain these privileges she had to be on the provisional or active staff of another hospital; that at the time her privileges were terminated at Harris, her privileges also terminated at Huguley; that she applied for provisional or active staff privileges at Huguley, but that her application was denied because she had not had enough admissions at that hospital for an independent evaluation of her performance

there and because of the action of Harris Hospital; that she was able to get privileges at a suburban hospital that had an obstetrical unit but shortly thereafter the obstetrical unit had been closed; that she had applied to several other hospitals with obstetrical units in Tarrant County and that her application had been denied at each because of the action of Harris; and that she was totally unable to practice her obstetrical specialty although she had been privileged at two small suburban hospitals as a gynecologist. (Statement of Facts, pp.101-104). Dr. Garrett also testified that as soon as his privileges were limited at Harris, the other Tarrant County hospitals followed suit by limiting his privileges based on the Harris action. This evidence was totally undisputed by the defendant and was supported by documents introduced by the defendant. Thus, the

circuit court's finding that denial of staff privileges had not "hampered her ability to obtain staff privileges at any other Fort Worth hospital" is clearly erroneous.

The Circuit Court also erroneously found that "Diggs treated her patients in Harris Hospital without direct supervision" and that "as a provisional staff member she was required to have a sponsor present during surgical procedures, but the purpose of that requirement was to have someone to attest to her essential qualifications, not to direct the details of the exercise of her skill"; therefore, "the hospital does not direct the manner or means by which Diggs renders medical care." The medical staff by-laws did state that the sponsor was supposed to observe enough cases to be able to attest to the competency of the physician and ordinarily "observation" was

the only thing required of a sponsor. However, in plaintiff's case, from the very beginning her "sponsors" were instructed to "scrub in" with her. The quality assurance committee's minutes indicate that she was first criticized and proposed to be terminated because she did not have a "sponsor scrub" in with her. When the Medical Board decided to retain plaintiff on the provisional staff, she was instructed by the Chief of Staff that she was to continue to have her sponsors attend in each surgical case and delivery and she was to "seek consultation" with them in problem situations. Other records of two patients treated by plaintiff exemplify that the sponsors took a more active than passive role in working with plaintiff. On one occasion (Chart No. 645-058), one of the nursing staff of the hospital called plaintiff's sponsor and requested

consultation before plaintiff arrived at the hospital. In response to this request the sponsor, who was at the hospital, examined and administered treatment to the patient before plaintiff arrived at the hospital. On another occasion, prior to deciding to perform a C-section, both plaintiff and her sponsor unsuccessfully attempted a low forceps delivery. Further, as noted previously, the hospital instructed Dr. Garrett that he would have to retain another surgeon to consult on his cases before he could render medical care to his patients; otherwise his privileges would be terminated. Dr. Byrd testified in at least one instance that even when he was on medical staff the hospital exercised control over the manner in which he treated his patients. He recounted an incident with a patient who had bilateral pneumonia, and was twenty-six weeks pregnant upon

admission. A member of the hospital advised the patient that she would be discharged at a certain time; this decision was made and conveyed to the patient without ever consulting Dr. Byrd. In other words, again the hospital intervened in the course of the medical care of a patient and exercised direct control over the details of the care. In summary, despite the fact that the medical staff bylaws provide for what appears to be passive observation and evaluation of medical care, the practice of the hospital and its medical staff was to intervene and actively participate in the day to day care and treatment of another physician's patients. In fact, Dr. Digg's sponsors were asked to do so and she was instructed to use them in this manner. Again, the finding that the hospital did not control the manner of her work is erroneous. Further, it is undisputed that

the hospital controlled the "means" by which she rendered care since it owned the facility and equipment and it furnished the support staff for rendering care while the patient was in the hospital.

The Circuit Court did not address the merits of plaintiff's claim but solely addressed the standing of plaintiff to assert a cause of action for relief under Title VII. As noted in the excerpts from Senate debate in 1972, the right of a female and minority physician to assert a claim for relief under Title VII is a most valuable right. There is a clear conflict between Circuit Courts on this issue. (The conflict is most apparent when comparing the opinion of the Seventh Circuit in Doe with the opinion of the Fifth Circuit in the instant case.) Hospitals have adopted the "privilege" system primarily to avoid liability for tort under

common law agency principles. They are attempting to use the same "loophole" to avoid liability for discriminatory practices which destroy the ability of physicians who should be protected from such destruction by a broad and proper application of Title VII. The economic realities of the relationship between physicians and hospitals compels the reversal of the decision of the Fifth Circuit below.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari have this 19th day of September, 1988, been forwarded to all counsel of record.

John B. McNamara, Jr.

88-569

NO. 87-1631

Supreme Court, U.S.
FILED
SEP 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DR. JACQYLYN DIGGS,

Petitioner

v.

HARRIS HOSPITAL-METHODIST, INC.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dr. Jacqulyn DIGGS,
Plaintiff-Appellant,

v.

HARRIS HOSPITAL-METHODIST,
INC., Defendant-Appellee.

No. 87-1631.

United States Court of Appeals,
Fifth Circuit

June 21, 1988.

Physican brought employment discrimination action against hospital as a result of hospital's terminating physician's staff privileges. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., entered judgment against physician, and physician appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) employee-employer relationship did not exist between physician and hospital which would confer upon physician standing to bring claim under Title VII, and (2) physician did not have claim under Title VII on ground that

hospital's action interfered with her employment opportunities with her patients, with whom she did not have employee-employer relationship.

Affirmed.

1. Civil Rights

Employee-employer relationship did not exist between physician and hospital which would confer upon physician standing to bring Title VII employment discrimination claim as result of hospital's terminating her staff privileges; there was no evidence that staff privileges at hospital were necessary to physician's practice or that denial of staff privileges at hospital hampered her ability to obtain staff privileges at other hospitals in community, hospital did not direct manner or means by which physician rendered medical care, physician was under no duty to admit any of her patients to hospital, and hospital did not pay physician for her services. Civil

Rights Act of 1964, §§ 701(b), 703(a)(1), as amended, 42 U.S.C.A. §§ 2000e(b), 2000e-2(a)(1).

2. Civil Rights

Physician did not have Title VII employment discrimination claim against hospital, which terminated physician's staff privileges, as result of effect such termination had on physician's employment opportunities with her patients, with whom she did not have employee-employer relationship. Civil Rights Act of 1964, §§ 703(a)(1), 706, as amended, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-5.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, GARWOOD and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

Jacqulyn Diggs, a black female physician, brought a Title VII action

against the private, non-profit hospital that terminated her staff privileges. Following a bench trial, the district court denied Diggs all relief, ruling against her both on the ground that she lacked the capacity to bring suit under Title VII because she was not an employee of the defendant hospital, and on the merits. Because we find that Diggs failed to prove the existence of an employment relationship with which the hospital allegedly interfered, we affirm.

I. Facts and Proceeding Below.

Diggs received her M.D. degree from the University of Texas at Galveston in 1977, and completed a residency in obstetrics and gynecology at John Peter Smith Hospital, Fort Worth, Texas in 1981. She is licensed to practice medicine in Texas.

In July 1981, Diggs applied for staff privileges at Harris Hospital-Methodist,

Inc. ("Harris Hospital") in Fort Worth. Staff privileges permit a physician to admit her private patients to the hospital for medial treatment and to utilize the facilities and personnel of the hospital in caring for her patients. At Harris Hospital, physicians who have staff privileges are designated as appointed to the medical staff of the hospital. Diggs was initially appointed to the temporary medical staff at Harris Hospital, and in September 1981 she was appointed to the provisional medical staff.

Diggs retained her provisional status for the ensuing three years, during which time the hospital repeatedly considered termination of her privileges due to her failure to comply with the requirement of sponsor-observation imposed on provisional staff members, and concerns over several instances of perceived case mismanagement by Diggs. Following several warnings,

hearings, and reviews, the hospital terminated Diggs' staff privileges on August 28, 1984.

One year later, in August 1985, Diggs brought this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The action alleged discriminatory acts by Harris Hospital on the basis of race, sex, and/or in retaliation for a prior charge of discrimination. The district court entered judgment in July 1987 against Diggs, who now appeals.

II. Discussion

Congress enacted Title VII of the Civil Rights Act of 1964 to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468, 102 S.Ct. 1883, 1890-91, 72 L.Ed.2d

262 (1982). Specifically, the Act provides in part that:

> (a) It shall be unlawful employment practice for an employer-
>
> (a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. §2000e-2(a)(1) (emphasis added).

Our court has previously held that a Title VII claim must necessarily involve an employment relationship. Broussard v. L. H. Bossier, Inc., 789 F.2d 1158, 1159 (5th Cir. 1986). Further, it is well-settled in this circuit that we determine whether a plaintiff was an "employee" for Title VII purposes by applying the hybrid economic realities/common law control test

first advanced in Spirides v. Reinhardt 613 F.2d 826, 831 (D.C. Cir. 1979). See Broussard, 789 F.2d at 1160;[1] Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985). This circuit has not resolved the question of whether a person can bring a

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1/ Broussard, however, misstates the name of the test when it says "we have recently held that the economic realities test identified in Spirides v. Reinhardt guides the analysis of whether an individual is an employee for Title VII purposes. Mares v. Marsh." 789 F.2d at 1160 (citations omitted). The "economic realities" test is a more expansive standard for determining employee status, and one which our court expressly declined to adopt. Mares, 777 F.2d at 1067-1068 & n. 2. The test formulated in Spirides combines the economic realities test used in cases under the Fair Labor Standards Act with consideration of common law agency principles, focusing on the employer's right to control the manner and means of the worker's performance. Id. at 1067 & n. 2. Thus, we herein formulate the label "economic realities/common law control test" to indicate the test promulgated by the Spirides court.

Title VII action against an employer[2] who has interfered with that person's employment opportunities with a third party.

Diggs advances two alternate theories of Title VII coverage: (1) that she was an employee of Harris Hospital, and (2) that Title VII encompasses interference by an employer with a person's access to the employment market.

A. The Relationship Between Diggs and Harris Hospital

[1] If an employee-employer relationship existed between plaintiff Diggs and defendant Harris Hospital, undoubtedly Diggs has standing to bring a claim under Title VII. Harris Hospital does not dispute that it is an employer as defined by

---

2/ For the purposes of Title VII, an "employer" is basically "a person [including an entity] engaged in an industry affecting commerce who has fifteen or more employees . . ." 42 U.S.C. §2000e(b).

Title VII. The question here, then, is whether Diggs' relationship with Harris Hospital was one of employee or independent contractor. While the parties agree that the economic realities/common law control test of Spirides is the appropriate standard, they disagree on the result of its application to the facts of this case. Harris Hospital argues that Diggs was an independent contract, while Diggs contends that she was an employee.

We agree with the district court that Diggs was not an employee of Harris Hospital for purposes of Title VII. The economic realities/common law control test considers the economic realities of the work relationship,[3] and the extent to

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3/ The economic realities test applied in cases under the Fair Labor Standards Act deems persons employees "if they 'as a matter of economic reality, are dependent upon the business to which they render service.'" Mares, 777 F.2d at 1067 (citation omitted).

which the one for whom the work is being done has the right to control the details and means by which the work is to be performed, with emphasis on this latter control factor. Mares, 777 F.2d at 1067. Additionally, courts are to consider the following factors in determining whether an employee-employer relationship exists for Title VII purposes:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
>
> (2) the skill required in the particular occupation;
>
> (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;
>
> (4) the length of time during which the individual has worked;
>
> (5) the method of payment, whether

by time or by the job;

(6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation;

(7) whether annual leave is afforded;

(8) whether the work is an integral part of the business of the employer;"

(9) whether the worker accumulates retirement benefits;

(10) whether the "employer" pays social security taxes; and

(11) the intention of the parties.

Broussard, 789 F.2d at 1160 (quoting Spirides, 613 F.2d at 832).

As a matter of economic reality, Diggs, as an obstetrician-gynecologist, is dependent upon having hospital staff privileges in order to pursue her medical practice. There was no evidence submitted at trial, however, that privileges at Harris Hospital were necessary to her

practice or that denial of staff privileges at Harris Hospital hampered her ability to obtain staff privileges at any other Fort Worth hospital. Furthermore, in determining her working relationship with the hospital, we are to focus more on the control factor. Mares, 777 F.2d at 1067. While the hospital supplies the tools, staff and equipment utilized by Diggs in delivering medical care at the hospital, and while it imposes standards upon those permitted to hold staff privileges, the hospital does not direct the manner or means by which Diggs renders medical care. Diggs is under no duty to admit any of her patients to Harris Hospital, and Harris Hospital does not pay her for her services.

Diggs treated her patients in Harris Hospital without direct supervision. As a provisional staff member she was required to have a sponsor present during surgical

procedures, but the purpose of that requirement was to have someone to attest to her essential qualifications, not to direct the details of the exercise of her skill. The hospital does not provide salary or wages to physicians with staff privileges, nor does it pay their licensing fees, professional dues, insurance, taxes, or retirement benefits. Diggs had staff privileges at several other Fort Worth area hospitals during the time she was on Harris Hospital's provisional staff.

B. Interference with Diggs' Employment Opportunities

[2] Diggs also contends that even if her relationship with Harris Hospital was not one of employment, the alleged discrimination falls within the scope of Title VII because Harris Hospital's actions interfered with her employment opportunities. We reject the argument for the reason that even if we were to hold that Harris

Hospital could violate the provisions of Title VII by interfering with Diggs' relationship with a third party--a question we do not reach, that relationship would have to be an employment relationship under the economic realities/common law contract control test discussed above. The employment opportunities to which Diggs points were her potential treatment arrangements with private patients. Diggs was not employed, nor did she seek employment, by a professional association. She has no Title VII claim.

Title VII does prohibit discrimnation "against any individual with respect to his . . . privileges of employment." 42 U.S.C. §2000e-2(a)(1) (emphasis added). Numerous courts have found that this language encompasses all situations in which an employer subject to Title VII has discriminatorily interfered with a person's employment opportunities, either with that

employer or with a third party. Pardazi v. Cullman Medical Center, 838 F.2d 1155, 1156 (11th Cir. 1988) (where Iranian physician denied staff privileges was unable to finalize employment contract with professional corporation); Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019, 1021 (9th Cir. 1983) (where hospital rejected contract proposal, allegedly on racial grounds, of professional corporation under which corporation's Hispanic physician-employee would have been the director of the hospital's emergency room); see also Note, The Liability of Third Parties Under Title VII, 18 U.Mich.J.L. Ref. 167 (1984). Because Title VII is remedial and humanitarian in nature, it should be liberally construed, resolving ambiguities in favor of the complainant. Spirides, 613 F.2d at 831; see also Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970).

The opportunities interfered with must, however, be in the nature of employment relationships, as determined by application of the economic realities/common law control test adopted by our court. See Broussard, 789 F.2d at 1159; Gomez, 698 F.2d at 1021; Beverley v. Douglas, 591 F.Supp. 1321, 1327 (S.D.N.Y. 1984) ("There must be some nexus with an employment relationship for Title VII to apply, but the connection need not necessarily be direct."). Application of a different standard in third-party situations could result in permitting recovery to an independent contractor where the discriminatory practices of the defendant interfere with the plaintiff's working relationship with another party, but denying recovery where the plaintiff's working relationship is with the defendant.

The clear language of Title VII,[4] as well as the need for consistency, dictates application of one standard for determining employee status, regardless of whether the scrutinized work relationship is with the defendant or another party. A Title VII claim must involve discriminatory conduct that affects an employment relationship of the complainant, as determined by application of the economic realities/common law control test.

Under the above test, Diggs' relationship with her patients is decidedly not one of employment. Her patients did not

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4/ Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C. §2000e-2(a)(1) (emphasis added). Further, Title VII provides for enforcement of its provisions against one who engages in an "unlawful employment practice." 42 U.S.C. §2000e-5 (emphasis added).

control the manner and means of her professional treatment. A physician's work involves considerable skill. Further, patients do not furnish the equipment, instruments, supplies, and support staff used in a physician's rendition of medical care. Payment is for services rendered, not on-going compensation. Additionally, a physician provides care for numerous patients within a short period of time.

Because plaintiff has failed to establish any connection between Harris Hospital's alleged actions and an employment relationship involving Diggs, the decision of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JACQULYN DIGGS	§	
	§	CIVIL ACTION NO.
VS.	§	4-85-557-E
	§	
HARRIS HOSPITAL-METHODIST, INC.	§	

JUDGMENT

This action came on for trial before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is ORDERED and ADJUDGED that the plaintiff take nothing, and that the action be dismissed on the merits.

Entered this 20th day of July, 1987.

ELDON B. MAHON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JACQULYN DIGGS	§	
	§	CIVIL ACTION NO.
VS.	§	4-85-557-E
	§	
HARRIS HOSPITAL-METHODIST, INC.	§	

MEMORANDUM OPINION

This Court held a nonjury trial in the above-styled case commencing on January 26, 1987 and concluding on January 29, 1987. After a thorough review of the testimony, the evidence, the pleadings, and the applicable law, the Court makes the following determination.

FACTS

Plaintiff, Dr. Jacqulyn Diggs, brought suit against the defendant, Harris Hospital-Methodist, Inc., alleging that Harris Hospital discriminated against her on the basis of race and sex in violation

of 42 U.S.C. §2000e et seq. by terminating her medical staff privileges. Diggs is a black female. Harris Hospital is a private, not-for-profit corporation.

Diggs completed her residency at John Peter Smith Hospital in Fort Worth, Texas in obstetrics and gynecology. During her residency, Diggs spent six months on rotation at Harris Hospital as part of her training.

The physicians who have staff privileges at Harris Hospital have formed an organization known as the Medical Staff of Harris Hospital. The executive committee of the Medical Staff is the Medical Board. There are several committees of the Medical Staff, including a Credentials Committee, a Medical Staff Quality Assurance Committee, and a Division Quality Assurance Committee for the Division of Obstetrics and Gynecology (OB-GYN QA Committee). These committees were involved

in the decision to terminate Diggs' privileges at Harris Hospital.

The final decision on appointments, reappointments, and revocations of appointments to the Medical Staff are made by the Board of Trustees of Harris Hospital. However, such action is not made until after the Board of Trustees has received a recommendation from the Medical Staff. The Credentials Committee may grant temporary privileges to physicians at Harris Hospital. Such privileges permit a physician to admit patients to Harris Hospital so long as a sponsor signs the admittance form.

All initial appointments to the medical staff are to the Provisional Staff for a period of six months. After six months on the Provisional Staff, a physician is eligible to be elevated to the Active Staff and is reviewed by the Credentials Committee and the OB-GYN QA

Committee to determine whether the physician should be elevated.

Diggs was appointed to the temporary staff at Harris Hospital on July 14, 1981. Diggs was recommended by the Credentials Committee for appointment to the Provisional Staff on August 7, 1981. During the Medical Baord meeting of August 10, 1981, the Chief of the OB-GYN Committee, Dr. Abbott, stated that he was not satisfied with Diggs' training while present at Harris Hospital during her residency. This prompted the Medical Board to refer Diggs' application back to the Credentials Committee for further consideration. Dr. Abbott had never personally observed Diggs' work, however, it was his responsibility, as the chief of the department, to be knowledgeable about the work performed by the staff in the OB-GYN division. There is no evidence that

Dr. Abbott's concerns were motivated by racial or gender bias.

The Credentials Committee did consider Diggs' application further during its meeting on September 11, 1981. The chairman of the Committee "reported that the Chairman of the OB-GYN Department at John Peter Smith Hospital confirmed [Diggs'] professional competence but [stated that she was] a little lax in meeting her obligations." The Chairman of the OB-GYN Committee at John Peter Smith Hospital was Dr. Pelham Staples, who was one of Diggs' references and sponsors at Harris Hospital. There is no evidence that Dr. Staples was racially or sexually biased against Diggs. The Credentials Committee concluded their meeting by recommending that Diggs be appointed to the Provisional Staff with a request that her sponsors be unusually scrupulous in their observations of her.

The Medical Board adopted the recommendation of the Credentials Committee but added the further stipulation "that sponsors be required to actually scrub with Dr. Diggs." On September 28, 1981, the Board of Trustees appointed Diggs to the Provisional Staff. Diggs, at this time, was not informed that she would be monitored more closely than others on the Provisional Staff or that she needed to have a sponsor scrub with her.

On April 2, 1982, the Credentials Committee received a report from a nurse that Diggs violated the terms of her provisional appointment by operating on a patient without a sponsor present. The medical chart (368-673) for the patient in question indicates that Diggs performed the surgery in question without a sponsor present. Diggs admitted that she did not manage the case properly.

Diggs sent a request to the Medical Staff Office on May 7, 1982, requesting that she be promoted to the active staff. This was approximately 7-1/2 months after she was appointed to the provisional staff. In its meeting of May 18, 1982, the OB-GYN QA Committee reviewed Diggs' progress and recommended that Diggs' privileges be terminated because of her "flagrant" violations of her privileges with respect to case 368-673.

Pursuant to Diggs' request to be elevated to the active staff, the Chairman of the Credentials Committee advised Diggs' sponsors that her performance would be evaluated in July 1982. One of Diggs' sponsors, Dr. Bowen, recommended that Diggs be elevated to active staff without qualification. Another sponsor, Dr. McCoy, did not recommend that Diggs be elevated because he was not sure that her training was adequate. There is no evidence that Dr.

McCoy was motivated by racial or sexual bias.

Both the Credentials Committee and the Medical Board agreed that Diggs' privileges should be suspended and this recommendation was presented to the Board of Trustees. Diggs submitted a letter to the Board of Trustees on June 30, 1982 in which she admitted some mistakes with respect to usage of her sponsors and requested an opportunity to "reapply for provisional staff privileges."

At the suggestion of Dr. Abbott, the Credentials Committee reconsidered its earlier recommendation and decided to recommend that Diggs remain on the Provisional Staff under close supervision. The Medical Board concurred with the Credentials Committee's recommendation. The Board of Trustees renewed Diggs' provisional staff appointment and by letter dated August 3, 1982, informed her that one

of her sponsors must scrub with her on every case.

There is some discrepancy between the documents presented at trial and the testimony of Diggs as to her compliance with the requirement that provisional staff members have a sponsor present for their first twelve deliveries. The charts of patients treated by Diggs do not indicate that she had a sponsor present during her first twelve deliveries, however, Diggs testified that she met this requirement.

On August 9, 1982, a nurse informed the head nurse that Diggs needed to have a sponsor present at a delivery and that Diggs had not requested one to be present. On August 25, 1982, another nurse reported that Diggs did not have a sponsor present for a delivery. There is no evidence that either of these reports were made by nurses who were motivated by a racial or sexual bias against Diggs.

On August 25, 1982, after the second report of a delivery without a sponsor, the OB-GYN QA Committee, at the request of the OB-GYN Division Chief, conducted a special meeting to review Diggs' charts. There is no evidence that Diggs had sponsors present at the deliveries on August 2, 1982 and August 25, 1982. Diggs testified that she did not need to have a sponsor present at deliveries because she had completed her first 12 deliveries and because deliveries are not a surgical procedure. The OB-GYN QA Committee apparently disagreed with Diggs' interpretation of the word "surgery" since the minutes of the August 25, 1982 meeting state that Diggs displayed a general lack of compliance "with her granted privileges which specify that she have a physician assistant scrub in with her during surgery and have direct sponsorship observation of her work." The Committee also questioned Diggs' treatment

in four of the 33 cases which the committee reviewed. The OB-GYN QA Committee forwarded its findings to the Medical Staff QA Committee.

The Medical Staff QA Committee concluded that (1) Diggs' patient care failed to meet acceptable standards, (2) Diggs failed to comply with her sponsorship requirements, and (3) summary suspension of Diggs' privileges should be considered.

On September 10, 1982, the Credentials Committee decided to recommend that Diggs' privileges be terminated. On September 13, 1982, the Medical Board concurred in recommending that Diggs' privileges be terminated.

Diggs was given an opportunity to meet with the Medical Board on October 11, 1982. During the meeting, Diggs informed the Board that she did not pass the OB-GYN Examination and that she planned to take the examination the following year. After

this meeting, the Board decided to change its earlier decision and to retain Diggs on the Provisional Staff with the stipulation that she attend postgraduate courses in preparation for the OB-GYN Board Examination and that she fully meet the requirement of having a sponsor present at all deliveries and surgical cases.

At its November 16, 1982 meeting, the OB-GYN QA Committee decided to conduct quarterly reviews of Diggs' cases in light of the fact that their recommendation to terminate Diggs was rejected by the higher committees. On February 15, 1983, the OB-GYN QA Committee did the first of these quarterly reviews. The Committee reviewed two cases, finding that the care in one of the cases was satisfactory and finding that the care in the other case (#645-058) could not yet be evaluated because of discrepancies in the notes of Diggs and one of the nurses involved in the case. Subse-

quently, the Committee sent a letter to Diggs requesting that she detail the sequence of events involving case 645-058.

In its May 6, 1983 meeting, the Credentials Committee decided that it would soon begin a six month review of Diggs' cases. The Chairman of the Committee notified Diggs on May 11, 1983 that she needed to respond to the letter from the OB-GYN QA Committee about management of case 645-058 so that the Credentials Committee could consider the case in its review.

The minutes of the May 17, 1983, OB-GYN QA Committee meeting state that Diggs had not treated any patients at Harris Hospital since February 1983. Diggs did respond to the letters inquiring about the case 645-058 on May 23, 1983, stating that she properly cared for the patient in question.

On July 19, 1983, the OB-GYN QA Committee reviewed Diggs' cases for the period from February through June 1983. All seven of the patients reviewed had been admitted in June 1983, which was the month that Diggs was terminated at another local hospital. The Committee found that the management of the cases was adequate although one case involved a 1-1/2 hour laparascopy for which no reason could be identified.

On September 1, 1983, Diggs, along with three other black physicians, filed complaints with the Office of Civil Rights alleging that Harris Hospital engaged in discriminatory practices and procedures. Harris Hospital expressed a desire to work with the black physicians as to their concerns. In addition, some of the black physicians were appointed to the review committees on the medical staff. After

this action, the four physicians withdrew their complaints against the hospital.

On October 4, 1983, Diggs requested elevation to the active staff approximately two years after she was admitted to the provisional staff. The October 18, 1983 minutes of the OB-GYN QA Committee meeting state that in response to Diggs' request for elevation, the Committee reviewed 78 cases and had questions of Diggs' management of 16 of the cases. The Chairman of the Committee then sent a letter to Diggs on November 3, 1983, inviting her to come to the Committee's meeting on November 15, 1983 to discuss the 16 cases.

Diggs informed the Committee that she would not be able to discuss the cases until December. Accordingly, the Chairman of the Committee sent a letter to Diggs on November 21, 1983 informing Diggs that the meeting could occur no later than December

8, 1983. Diggs, by letter dated December 7, 1983 to the Chairman, stated that she would not attend the December 8, 1983 meeting. The meeting was rescheduled for February 7, 1984.

At the February 7, 1984 meeting, the Committee discussed 13 of the 16 cases with Diggs. On 11 of the 13 cases, the Committee questioned Diggs' treatment of the patient. By letter dated February 9, 1984, the Chairman of the OB-GYN QA Committee notified Diggs that they unanimously concluded that Diggs' privileges should be terminated. One of the physicians on the committee was a black physician, Dr. Henry.

The OB-GYN QA Committee's recommendation was forwarded to the Credentials Committee which invited Diggs and any other physician knowledgeable about Diggs' treatment to attend its meeting on March 9, 1984. Diggs accepted the invitation and brought one of her sponsors with her. She

informed the Committee that she disagreed with several of the conclusions of the OB-GYN QA Committee. She also told the Committee that her earlier problems with sponsors had been corrected. Finally, she informed the Committee that she had failed to pass the written part of the OB-GYN Board examination, and that she had not re-registered to take the examination again. At the conclusion of the meeting the Credentials Committee recommended that Diggs' privileges be terminated.

This recommendation was approved by the Medical Board on March 12, 1984. Diggs was notified of the Medical Board's decision and her right to a hearing before the Medical Board. Diggs met with the Medical Board on June 11, 1984 at which time she discussed with the Board each of the 13 cases which the other committees had considered. By letter dated June 14, 1984, the Chief of Staff informed Diggs that the

Medical Board would recommend to the Board of Trustees that Diggs' privileges be terminated "because of their continued concern with your practice in the area of judgment, sequence of care and comprehension of appropriate management." The Board of Trustees met on August 28, 1984, at which time they sustained the Medical Board's recommendation to terminate Diggs.

The Board of Trustees' decision only pertains to Diggs' right to admit patients at Harris Hospital. It does not relate to her rights at other hospitals.

DISCUSSION

In this suit, Plaintiff Diggs seeks declaratory relief, a mandatory injunction, and back pay under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. In order for Diggs to recover under this federal enactment, she must be an "employee" of Harris Hospital as defined by 42 U.S.C. §2000e(f) or an applicant for

employment of Harris Hospital. Although there is a split amongst the Circuit Courts as to the proper standard to apply in determining whether one is an employee or an independent contractor, the standard to apply in the Fifth Circuit has been clear since 1979. Spirides v. Reinhardt, 613 F.2d 826, 831 (5th Cir. 1979).

> "Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor . . . If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."

Id. See also Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985).

This Court finds that Diggs is not an employee of Harris Hospital. At all times relevant to this suit, Diggs was a member of the voluntary probational staff at Harris Hospital. She was seeking elevation to the voluntary active staff at Harris Hospital. Diggs has a practice outside of the hospital and only comes to the hospital to perform tasks that she cannot perform at her office. Diggs is not paid a salary by Harris Hospital. Diggs does not receive insurance or retirement benefits from the hospital. In addition, Harris Hospital cannot require Diggs to admit patients into Harris instead of another hospital. Diggs was free to admit patients into any hospital at which she had privileges. In sum, based solely upon the facts in this case, the Court finds that Diggs was not an employee of Harris Hospital and, therefore,

that she is not permitted to bring a claim under Title VII against Harris Hospital.

Assuming arguendo that Diggs was an employee of Harris Hospital, the Court will address Diggs' claim under Title VII. For Diggs to establish a prima facie case of discrimination under the test in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) and its progeny, she must prove that (1) she belonged to a racial minority, (2) she was qualified to continue as a member of the provisional staff or to be elevated to the active staff, (3) she was not retained on the provisional staff or elevated to the active staff, and (4) she was replaced by a non-minority or that Harris Hospital continued to seek applicants with similar qualifications. Id. Chaline v. KCOH, Inc., 693 F.2d 477, 480 (5th Cir. 1982).

Based upon a thorough examination of the evidence, this Court finds that Diggs

did not satisfy the second requirement for a prima facie case. Diggs' treatment of her patients was evaluated by several Committees on the Medical Staff with the uniform conclusion that Diggs' patient care was not satisfactory. During the trial, Diggs questioned the judgment of the committees since she claimed that some of the facts upon which the committees reached their conclusion were not correct. However, these alleged factual misstatements did not have any bearing on the final conclusion of the committees. In other words, even if Diggs' version of the facts were true, the committees would still have reached the same result.

There is no evidence that any of the members of the committees exhibited any prejudice against Diggs because she was a woman or a black. There is an abundance of evidence which shows that Diggs' treatment was considered suspect and that she was

carefully scrutinized because of this. The committees found that Diggs' patient care was not satisfactory and they recommended that she be terminated. Instead of being terminated, she was allowed to remain on the provisional staff. The quality of work performed by Diggs continued to be suspect, and it was only then that she was denied further privileges at Harris. The chronology detailed above illustrates that Diggs was treated fairly by those who reviewed her work.

Diggs also alleges that she was retaliatorally discharged. In order to make a prima facie case of retaliation, Diggs must prove (1) that she was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal link between participation in the protected activity and the adverse employment decision. McMillan v. Rust College,

Inc., 710 F.2d 1112, 1116 (5th Cir. 1983). Diggs did engage in a protected activity when she, along with three other doctors, filed a complaint against Harris Hospital with the United States Office of Civil Rights. However, there is not a scintilla of evidence which indicates that the filing of the complaint had any bearing on the decision of Harris Hospital to deny her application for appointment to the active staff or to terminate her privileges as a member of the provisional staff. Thus, Diggs has not made out a prima facie case for retaliatory discharge.

Even if Diggs had made out a prima facie case under either theory discussed above, she would not be able to recover since Harris Hospital had a legitimate non-discriminatory reason for denying Diggs' privileges, namely, that her work was not satisfactory. Diggs has presented no credible evidence that Harris Hospital's

reason for denying Diggs' privileges was merely a pretext and that she was actually denied her privileges because she filed the complaint with the United States Office of Civil Rights.

In sum, this Court finds that Diggs is not an employee of Harris Hospital and, therefore, does not have a cause of action under Title VII. Furthermore, even if Diggs could bring a claim under Title VII, this Court finds that Harris Hospital did not discriminate against Diggs in its decision not to elevate Diggs to the active staff or in its decision not to retain Diggs on the provisional staff.

Signed this 20th day of July, 1987.

ELDON B. MAHON
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 19 1988
JOSEPH F. SPANIOL, JR.

No. 88-569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DR. JACQULYN DIGGS,

Petitioner,

v.

HARRIS HOSPITAL-METHODIST, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED
(AS SUBMITTED BY PETITIONER)

I. Whether the application of 42 U.S.C. §§ 2000e *et seq.* extends beyond the traditional employer-employee relationship and prohibits discrimination by anyone having control over one's access to a job market.

II. If a traditional "employment" relationship is required to establish standing of a plaintiff under 42 U.S.C. §§ 2000e *et seq.*, what test should be applied as a standard for determining whether or not an employment relationship exists, to-wit: economic realities, common law control, or a combination of both.

III. Whether Plaintiff met her burden to establish standing to assert a claim for relief under 42 U.S.C. §§ 2000e *et seq.*

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STATEMENT OF THE CASE

This is a Title VII action in which Jacqulyn Diggs, M.D., complains that Harris Hospital-Methodist,[1] in denying her medical staff privileges,[2] discriminated against her on the basis of her race and sex and retaliated against her for filing a Title VII complaint with the Office for Civil Rights.

A. Course of Proceedings and Disposition in the Courts Below

Trial on the merits before the Honorable Eldon B. Mahon, United States District Judge, began on January 26, 1986, and ended on January 29, 1986. On July 20, 1986, the district court entered judgment dismissing Diggs' action on the merits[3] and issued a memorandum opinion setting forth detailed findings of fact and conclusions of law.[4]

The district court found that Diggs was not an employee of Harris and held that she was not entitled to bring a Title VII claim.[5] Ruling on the merits, the

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[1] Harris is a private, non-profit hospital corporation owned by the Central Texas Annual Conference of the United Methodist Church. Harris has no subsidiaries other than wholly owned subsidiaries. The Central Texas Annual Conference also owns the following corporations which, with their respective subsidiaries, may be considered affiliates of Harris: Harris Methodist Health System, Harris Methodist H-E-B, and Harris Methodist Affiliated Hospitals.

[2] Harris' Board of Trustees terminated Diggs' privileges as a member of the Provisional Staff and denied her request for elevation to Full Staff status on August 28, 1984.

[3] The judgment appears in the Appendix to Diggs' Petition for Writ of Certiorari ["Petitioner's Appendix"] at App. 20.

[4] Petitioner's Appendix, at App. 21-45.

[5] Petitioner's Appendix, at App. 40-41.

district court held that even if Diggs were entitled to seek relief under Title VII, Harris had not discriminated or retaliated against her.[6]

Diggs appealed. The Fifth Circuit affirmed in an opinion discussing only Diggs' right to seek relief under Title VII.[7]

Without requesting a rehearing, Diggs petitioned this Court for a writ of certiorari. In this Court, Diggs attacks the Fifth Circuit's holding that she failed to prove the existence of an employment relationship with which the hospital allegedly interfered. She does not attack the adverse findings or conclusions of the district court on the merits of her Title VII claim.

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[6] Petitioner's Appendix, at App. 42. Judge Mahon specifically stated that Harris did not discriminate against Diggs in its decision not to elevate her to the active staff or retain her on the Provisional Staff. He also made the following findings, among others: (1) that there was no evidence that hospital personnel or members of Harris' Medical Staff committees discriminated against Diggs because she was a woman or black; (2) that there was an abundance of evidence that Diggs' treatment of patients and the quality of her work was considered suspect; (3) that Diggs was treated fairly by those who reviewed her work; and (4) that there was not a scintilla of evidence which indicated that Diggs' filing of a complaint with the Office for Civil Rights had any bearing on the decision to deny her application for privileges. Unpersuaded by Diggs' evidence of pretext, Judge Mahon found that Diggs had presented no credible evidence that Harris' reason for denying Diggs' privileges was merely a pretext.

[7] *Diggs v. Harris Hospital-Methodist, Inc.*, 847 F.2d 270 (5th Cir. 1988). The opinion appears in Petitioner's Appendix at App. 1-19.

B. Facts

Jacqulyn Diggs is a black, female physician who in 1977 received her M.D. degree and license to practice medicine in Texas.

From July 1, 1977, to June 30, 1981, Diggs trained as an intern and as an extern at John Peter Smith Hospital ["JPSH"] in Fort Worth. During her years at JPSH, Diggs entered into four one-year employment contracts which provided that she would receive a stipend, vacation and other paid leave, and various perquisites of employment (including but not limited to professional liability insurance and group hospitalization for herself and her family). The contracts also provided that Diggs' schedule and the duration and sequence of her assignments would be determined by JPSH personnel.[8] During her last three years at JPSH, Diggs received postdoctoral training in obstetrics and gynecology.

On June 5, 1981, while finishing her term at JPSH, Diggs applied for membership on the Harris Medical Staff with privileges in obstetrics and gynecology.[9] Harris granted Diggs temporary privileges immediately after receiving a favorable letter of recommendation from the third of her three references.

From July, 1981, through September 21, 1981, Diggs had temporary privileges at Harris. On September 21, 1981, Diggs' appointment as a provisional

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[8] The four employment contracts were admitted into evidence as part of Diggs' file at JPSH. DX-38, at 56-63.

[9] At or about the time Diggs applied for privileges at Harris, she also applied for privileges at other area hospitals, including All Saints Episcopal Hospital, HCA Medical Plaza Hospital, JPSH, and Huguley Memorial Medical Center.

member of the Medical Staff became effective. As a provisional member, Diggs was subject to the hospital's Criteria for Obtaining and Maintaining Staff Privileges ["the Criteria"].[10]

Diggs served on the Provisional Staff for seven months without being reviewed by the Quality Assurance Committee of the Division of Obstetrics and Gynecology ["the OB-GYN QA Committee"].[11] The record further reflects that Diggs did not receive any special attention between September 21, 1981, and April 2, 1982, from the chief of her division, from any Medical Staff committee, from any of the spon-

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[10] The Criteria changed while Diggs was on the Provisional Staff. The Criteria in effect when Diggs was admitted to the Provisional Staff were admitted into evidence as an attachment to PX-10. See Note 11, *infra*.

[11] Diggs claims that Harris and the OB-GYN QA Committee discriminated against her by not giving her an automatic six months review in March or April of 1982. In support of this contention, Diggs cites Medical Staff bylaws calling for automatic six months reviews. The bylaws (PX-2) cited were not in effect in 1982, and Diggs' own exhibit list (Tr. 194-200) identifies them as being "effective April 1983 through August, 1984." The Criteria sent to Diggs (PX-10, Criteria) when she was appointed to the Provisional Staff state that Diggs had the right to request elevation to Full Staff status after she had been on the Provisional Staff for three months and that it would be her "personal responsibility to initiate a letter requesting Full Staff membership" after she completed the applicable time and operative requirements. The Criteria (PX-87, Myers #2, Criteria) in effect after amendment of the Medical Staff bylaws in April 1983 reflect new automatic review requirements which went into effect in April 1983. *See* PX-2, Bylaws, Art. V., § 4.A., at 8; *compare* PX-10, Criteria, II.A. with PX-87, Myers #2, Criteria II.A.

sors who signed her application, from the hospital administration, or from anyone else affiliated with Harris.

On April 2, 1982, Diggs violated the terms of her provisional appointment by performing surgery in the absence of a sponsor.[12] In so doing, she made a serious case management error which she has subsequently admitted. The case was called to the attention of the OB-GYN QA Committee which recommended that Diggs' privileges be terminated. The Medical Staff's Credentials Committee concurred. On June 14, 1982, the Medical Board decided that Diggs' privileges should be terminated. Although Diggs failed to appeal, the Medical Board agreed to reinstate her on August 3, 1982, after she requested a second chance.

Within one week after being reinstated, Diggs began violating the terms of her provisional appointment by delivering babies without a sponsor present. Diggs alleges that she was not required to have a sponsor present because she had already satisfied the hospital's requirement that she perform 12 deliveries in the presence of sponsor. The record, however, does not reflect that Diggs satisfied the 12-delivery requirement during the provisional period. Moreover, the 12-delivery requirement is a minimum requirement, the Criteria stating that members of the Provisional Staff may not deliver babies without sponsors present until the chief sponsor notifies the delivery room supervisor that they may do so.[13]

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[12] PX-75, Chart 368-673; TR 1:38-41; PX-10, Criteria, II.C.8; PX-61, Transcript 06/11/84, at 16.

[13] PX-10, Criteria, II.C.9. Diggs refuses to address this requirement and has consistently denied any violation of the Cri-

In response to reports that Diggs was again violating the terms of her provisional appointment, the OB-GYN QA Committee and the Credentials Committee recommended to the Medical Board that Diggs' privileges be terminated. When the matter came before the Medical Board, Diggs explained that she tried to have sponsors present for as many cases as she could. She also admitted that she had failed to pass a portion of the board certification exam in obstetrics and gynecology and stated that she had applied to retake the exam during the next year. On October 21, 1982, the Medical Board advised the OB-GYN QA Committee that Diggs would be permitted to retain provisional status with the stipulation that she attend postgraduate courses in preparation for the examination she said she would take.[14]

In February, 1983, the OB-GYN QA Committee reviewed the charts of patients treated by Diggs between November 1982 and January 1983. Because of inconsistencies between Diggs' notes and nurses' notes with respect to one of the charts, the Committee requested further information from Diggs and from the nurses involved. The nurses promptly responded to the Committee's inquiry. Diggs, however, did not respond to the Committee's March 14, 1983, letter to her until May 23, some 10 days after she had been advised by the Credentials Committee that it would

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teria, suggesting instead that members of the nursing staff reported her because they were prejudiced against her or incited to act by physicians who were prejudiced against her.

[14] Although Diggs may have applied to take the exam, the record reflects that she either did not take the exam or failed it a second time.

not consider a review of her privileges until she responded to the OB-GYN QA Committee inquiry.[15]

The patient chart and nurses' reports suggested that Diggs had ordered a caesarian section for a patient she had not examined. The patient had been admitted by Dr. Robert Henry, a black physician for whom Diggs was covering.[16] After Diggs scheduled the C-section, and while the patient was in labor, nurses contacted Dr. Charles Langham.[17] Langham examined the patient and artificially ruptured her membranes. Diggs then delivered the baby by spontaneous vaginal delivery. From the chart and nurses' notes, it appeared that Langham had averted an unnecessary C-section. Although the C-section had been scheduled, Diggs denies that she would have performed the C-section without first examining the patient.

From February through May, 1983, Diggs did not treat patients at Harris. Having no new charts to review, and having received no reply from Diggs to its earlier inquiry, the OB-GYN QA Committee had

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[15] Diggs offered into evidence a Harris envelope showing an April 11, 1983, postmark and stated that she received the OB-GYN QA Committee inquiry in that envelope. Whether Diggs received the inquiry in March or April, she did not respond to it until May 23.

[16] Dr. Henry was a member of the OB-GYN QA Committee and voted to recommend that Diggs' privileges be terminated the last time her performance was reviewed by that committee.

[17] Dr. Langham, also a black physician, was the chairman of the All Saints OB-GYN Department when Diggs was terminated from the Medical Staff at All Saints on June 6, 1983. Dr. Byrd, one of Diggs' witnesses, later blamed Langham for Diggs' downfall at All Saints. TR 3:118-119.

nothing to review with respect to Diggs when it met on May 17, 1983.

Meanwhile, Diggs was encountering problems at other hospitals. On June 6, 1983, All Saints terminated her privileges despite her attorney's threat to file a discrimination suit if her request for privileges were denied.[18] On August 30, 1983, Medical Plaza suspended Diggs' privileges. With her privileges being cut off at other area hospitals,[19] Diggs needed to secure her privileges at Harris. On September 1, 1983, two days after being suspended at Medical Plaza, Diggs filed a complaint with the Office for Civil Rights alleging discriminatory delay by Harris in the processing of her application.

Although she alleged delay by Harris, Diggs herself did nothing to speed up the consideration of her application. The Criteria reflect that a Provisional Staff member's chief sponsor is supposed to play a central role in the evaluation process and is charged with responsibility for reviewing each of the charts of the sponsored physician before the Credentials Committee recommends the physician for elevation. Diggs, how-

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[18] The letter from Diggs' attorney is in evidence as part of her file at All Saints. DX-31, at 20-22.

[19] The record reflects that Diggs was dropped from the JPSH Medical Staff when her six-month provisional period ended in late 1981 or early 1982. In October 1982, Diggs advised the Harris Medical Board that she was still practicing at All Saints but was not practicing much at Medical Plaza or Saint Joseph. All Saints terminated Diggs' privileges on June 6, 1983. On August 30, 1983, Medical Plaza suspended Diggs' privileges. On April 27, 1984, Saint Joseph advised Diggs that her privileges there had been terminated. Harris did not terminate her privileges until August 28, 1984.

ever, did not have a functioning chief sponsor during most of her term on the Provisional Staff. The record reflects that she had no chief sponsor from September 6, 1982, until June 23, 1983, at the earliest, and in all likelihood from September 6, 1982, until an unspecified date after September 9, 1983.[20] Obtaining sponsors and maintaining satisfactory working relationships with sponsors are duties placed on the physician seeking staff privileges, not the hospital. No testimony or documentary evidence demonstrates the efforts, if any, taken by Diggs before September 9, 1983, to obtain a new chief sponsor. No evidence indicates that the sponsors Diggs ultimately recruited would not have agreed to sponsor her if asked.

On October 4, 1983, Diggs formally requested elevation to Full Staff status. On November 11, 1983, Dr. Averhart submitted seven evaluation forms favorable to Diggs. In December, Dr. Byrd submitted five more. Meanwhile, Diggs secured a series of de-

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[20] The chief sponsor designated on Diggs' application for staff privileges was Dr. Robert W. Dowling. The record reflects that Diggs knew or should have known by September 6, 1982, that Dowling was no longer willing to serve as one of her sponsors. PX-23. The record does not reflect when Diggs obtained a new chief sponsor. Diggs testified that she recruited Drs. Vernon W. Averhart, who replaced Dowling as chief sponsor, and Wilbur Michael Byrd as sponsors after another sponsor, Dr. James McCoy, formally resigned on June 23, 1983. On September 9, 1983, the chairman of the Credentials Committee reported to the Committee that Diggs had been asked to furnish the names of physicians who were willing to serve as her sponsors. On November 11, 1983, Averhart submitted to the medical staff office seven evaluation forms dated November 7, 1983. Therefore, it appears that Averhart became Diggs' chief sponsor between September 9, 1983, and November 7, 1983.

lays which resulted in the postponement of any personal appearance by her before the OB-GYN QA Committee until February 7, 1984. After that meeting, the OB-GYN QA Committee unanimously recommended that Diggs' privileges be terminated. Diggs personally appeared before the Credentials Committee and the Medical Board and both agreed that her privileges should be terminated. On August 28, 1984, the Board of Trustees officially terminated Diggs' provisional privileges and refused to elevate her to full staff status.

REASONS FOR DENYING THE WRIT

I. DIGGS FAILED TO PROVE THE MERITS OF HER CASE AND IS THEREFORE NOT ENTITLED TO TITLE VII RELIEF.

II. THE COURT OF APPEALS CORRECTLY HELD THAT DIGGS FAILED TO PROVE THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP WITH WHICH HARRIS ALLEGEDLY INTERFERED.

SUMMARY OF THE ARGUMENT

I. ON THE MERITS

This case was fully tried and decided on the merits. After a careful review of the evidence, the district court determined that Diggs did not prove her discrimination or retaliation claims.

In this Court, Diggs does not seek review of the district court's findings or conclusions on the merits. The evidence, discussed extensively by the parties in the court of appeals, reflects that Diggs' case is based primarily upon (1) her misreading of Medical Staff Bylaws and the Criteria which applied to her as a member of the Provisional Staff and (2) her attri-

bution of discriminatory intent to hospital personnel and Medical Staff committee members who complied with hospital rules and regulations.

Diggs' treatment of patients at Harris was suspect and her irresponsible refusal to comply with sponsorship requirements placed her in a position where she could not satisfactorily explain the patient care decisions she made. Her choice of treatments and the steps she followed (or failed to follow) in making those decisions were such that the OB-GYN QA Committee, the Credentials Committee, the Medical Board, and the Board of Trustees were justified in finding that her practice was inconsistent with community standards. Diggs was denied privileges because there were substantial reasons for continued concern with her judgment, sequence of care, and comprehension of appropriate case management.

Diggs was not a victim of discrimination or retaliation. Harris articulated a legitimate, nondiscriminatory reason for its actions. Diggs failed to persuade the district court that pretext was involved. Because Diggs is not entitled to relief on the merits, her standing is irrelevant.

II. TITLE VII STANDING

Diggs is a physician in the private practice of medicine. At trial, she testified that she was not employed by Harris.

Although nothing in Title VII exempts hospitals from its coverage or provides that physicians per se may not be employees, the provisions of Title VII apply only to those physicians who are employees or seeking employment. Diggs was not such a physician.

Under the common law control test for distinguishing between employees and independent contractors, Diggs would not be classified as an employee of Harris. She did not provide services for Harris, and Harris did not control the manner in which she diagnosed or treated her patients.

Under the economic realities test applied in Fair Labor Standards Act and Social Security Act cases, Diggs would not be classified as a Harris employee. Diggs did not provide services to Harris, but instead utilized Harris facilities to provide services to those patients she chose to admit there. Not only did Diggs determine which patients to admit to Harris but she also determined what treatment they would receive while on the hospital premises.

Diggs rendered professional services for her patients in order to make a living for herself. No evidence suggests that Harris asked Diggs to perform services for anyone or told Diggs what services to perform, what fees to charge for the services she rendered, or what to do with the fees she collected. No evidence suggests that Harris participated in the collection of Diggs' fees or shared in those fees. As a physician in the private practice of medicine, Diggs had no duties to Harris, was independent of Harris, and had no relationship with Harris other than the right to admit patients and render services to them on Harris' premises.

Although obstetricians and gynecologists may need hospital affiliations in order to perform some of the procedures which are a part of their practice, Diggs was never dependent upon Harris. She obtained staff privileges and practiced at a number of area hospitals.

From February through May of 1983, she did not even treat patients at Harris.

The economic reality of Diggs' situation was that she needed access to hospital facilities where she could perform some of the procedures she wanted to perform, but her need for hospital facilities did not make her an employee of the many hospitals where she practiced. To the extent that Diggs could be described as "dependent" upon Harris, she became dependent only because other hospitals had earlier terminated or suspended her privileges.

In short, Diggs was not in economic reality a hospital employee artificially disguised as an independent contractor. She was her own master.

Although Harris is a Title VII employer, Harris never hired Diggs as an employee. Harris never discharged Diggs as an employee. Not having employed Diggs, Harris did not discriminate against her with respect to her compensation, terms, conditions, or privileges of employment. Moreover, Harris did not discriminate against Diggs *as an employee or applicant for employment* because she made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under Title VII. The allegations Diggs failed to prove would not have entitled her to Title VII relief even if the district court had believed them.

Diggs nevertheless alleges that she has standing because Harris in some manner interfered with her employment opportunities with her patients. Although patients may pay their physicians, the relationship between a physician and a patient is not one of employment. For the purposes of Title VII, the term

employee means "an individual employed by an employer." For Title VII purposes, however, an individual is not an employer unless he or she employs 15 or more employees. A physician providing services to hundreds of individual patients is not an employee of any of them, and Congress, in enacting Title VII, did not intend that those patients who happen to employ 15 or more employees in their businesses be classified as employers of the physicians they consult to treat their personal needs.

The Fifth Circuit correctly ruled that Diggs failed to prove the existence of an employment relationship with which Harris allegedly interfered. Diggs' right to relief, if any, did not arise under Title VII, and Diggs was not and is not entitled to seek Title VII remedies.

ARGUMENT

I. DIGGS FAILED TO PROVE THE MERITS OF HER CASE AND IS THEREFORE NOT ENTITLED TO TITLE VII RELIEF.

This case was tried and adjudicated on the merits. Although Harris moved for dismissal under Rule 41(b), the district court refused to dismiss the case on standing grounds and proceeded with the trial on the merits. Having heard the evidence, the district court found that Harris had not discriminated against Diggs, that Harris did not retaliate against Diggs for filing a complaint with the Office for Civil Rights, that Harris had articulated a legitimate, nondiscriminatory reason for its actions with respect to Diggs, and that Diggs' evidence of pretext was not credible.

On appeal, the parties discussed the evidence at length in their respective briefs. In the court of

appeals, Diggs' recitation of facts was inaccurate, incomplete, artificially skewed in her favor, and thoroughly misleading. The same is true of Diggs' presentation to this Court. For example, Diggs would have this Court believe that in July, 1982, following the first review of her cases by the OB-GYN QA Committee, the Committee recommended that her privileges be terminated solely because a sponsor did not "scrub" with her on one of her cases. She would have the Court believe that no one told her that sponsors were required to scrub with her.[21] She would have the Court infer that the OB-GYN QA Committee penalized her because she failed to comply with a minor technical requirement. She does not mention the Criteria for Obtaining and Maintaining Staff Privileges which provide that Provisional Staff members are not to perform surgery without a sponsor present until their chief sponsor advises the operating room supervisor that they may do so.[22] She fails to mention that on April 2, 1982, she performed surgery without a sponsor present.[23] She fails to state that while performing surgery, she made a serious case management blunder which could have resulted in a negative patient outcome, a mistake which she herself later admitted.[24]

Diggs complains that in 1982, the OB-GYN QA Committee did not comply with the Harris Medical Staff Bylaws because it did not give her an automatic

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[21] Pet. for Cert., at 9-10.

[22] PX-10, Criteria, II.C.7.

[23] PX-75, Chart 368-673; TR 1:38-41.

[24] PX-61, Transcript, 06/11/84, at 16.

six months evaluation.[25] She would have this Court believe that the failure resulted from an impermissible, discriminatory animus. She does not mention that the bylaw in question was part of the April *1983* Bylaws.[26] She does not mention that the Criteria in effect when she was admitted to the Provisional Staff did not provide for automatic reviews but required Provisional Staff members to request evaluation when they had completed the requirements for elevation to Full Staff.[27] She provided no proof that she was not reviewed at the same time and in the same manner as other physicians admitted to the Provisional Staff about the same time she was.

Diggs blames Harris for delaying the processing of her application and refuses to accept blame for failing to maintain suitable working relationships with the physicians who sponsored her.

At trial, Diggs failed to show that the Medical Staff Committees did not have legitimate concerns about the manner in which she practiced medicine. Although she suggests that as time went on she made fewer mistakes, she failed to show that the Medical Staff Committees had no reason to have continued concern with her judgment, with her sequence of care, and with her comprehension of appropriate case management. In some cases, Diggs admitted her errors. In others, she refused to admit that she had erred but suggested that she would follow different procedures or prescribe a different course of treatment if similar cases presented themselves.

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[25] Pet. for Cert., at 9.

[26] PX-2. *See* note 11, *supra.*

[27] PX-10, Criteria, II.A. *See* note 11, *supra.*

The differences between what the record reflects and what Diggs continues to portray as fact in this case explain why the district court's findings of fact vary so greatly from Diggs' version of reality. This Court can rest assured that the district court's findings of fact on the merits are fully supported by the record.

Diggs' treatment of patients at Harris was suspect. Her refusal to comply with sponsorship requirements placed her in a position where she could not satisfactorily explain the patient care decisions she made. The district court was correct, and not clearly erroneous, in finding that Diggs failed to prove discrimination or retaliation.

Harris articulated a legitimate, nondiscriminatory reason for its actions. At trial, Diggs failed to persuade the district court that the reasons given by Harris were pretexts, and the district court expressly found that Diggs' evidence of pretext was not credible. Under these circumstances, whether Diggs had standing to sue under Title VII is academic and irrelevant. Diggs has not complained in this Court of alleged errors by the district court in ruling on the merits. A ruling in Diggs' favor on her standing as a Title VII plaintiff would have no bearing on the ultimate outcome of this case.

II. THE COURT OF APPEALS CORRECTLY HELD THAT DIGGS FAILED TO PROVE THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP WITH WHICH HARRIS ALLEGEDLY INTERFERED.

Title VII does not cover all relationships between employers and the various parties with whom employers deal. Title VII deals with employment relationships. Insofar as employers are concerned, Title

VII deals with relationships between employers and their employees and individuals seeking to become their employees. Title VII also deals with the various individuals who seek or obtain services from employment agencies, who obtain or seek to obtain union membership, or who participate or seek to participate in various training programs.

Diggs was not an employee of Harris. At trial, she testified that she was not.[28]

Although nothing in Title VII exempts hospitals from its coverage, nothing in Title VII suggests that physicians who obtain staff privileges thereby become hospital employees. Physicians who work for hospitals as salaried employees, and physicians who provide services to hospitals as residents, interns, and externs in exchange for training, a stipend, and a variety of traditional employment perquisites, may not be fairly analogized to physicians who are granted staff privileges but do not work for the hospital.[29]

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[28] On cross-examination, Diggs testified on this subject as follows:

Q: Dr. Diggs, you at no time while you were at Harris Hospital were you an employee of the hospital, were you?

A: No.

Q: At all times you were a physician in the private practice of medicine, is that correct?

A: That's correct.

TR 1:107. Dr. Garrett, one of Diggs' witnesses, also testified that with the exception of pathologists and radiologists, the physicians who served on Medical Staff committees were not employees of the hospital. TR 3:29-30.

[29] In the debate over proposed Amendment No. 838 to the

In construing and applying social legislation relating to employers and employees, this Court and the courts of appeals have applied three major tests for distinguishing between employees, persons whom Congress defined or intended to be treated as employees for the purposes of specific social legislation, and those individuals who are genuinely in business for themselves and should not be treated as employees. Diggs would not be classified as an employee under any of the tests.

The first test is sometimes referred to as the common law control test. This test has been applied by

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Equal Employment Opportunities Act of 1971 (S. 2515), Senator Williams stated that "A substantial number of the physicians considered employed by public and private hospitals are interns and residents." 118 Cong. Rec. 3801 (1972). The words "considered employed" imply that only some of the physicians who practice at hospitals should, for Title VII purposes, be considered employees. Senator Williams also mentioned hospital-based physicians as being among those who might be considered employees. Because Senator Williams was addressing his remarks in opposition to an amendment that would have exempted hospitals from Title VII with respect to all physician-employees rather than an amendment purporting to define which physicians were and were not considered to be employees, his remarks are at best indicators of possible Congressional intent. For a discussion of the treatment of house staff physicians (interns, residents, and clinical fellows participating in hospital-based training programs, providing medical services to patients subject to the direction and control of the hospitals, receiving salaries, stipends, and other benefits, and being subject to state statutes pertaining to worker's compensation and unemployment benefits) under the 1974 amendments to the National Labor Relations Act, *see Physicians National House Staff Association v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980) (*en banc*), *cert. denied* 450 U.S. 917 (1981).

some courts in Title VII cases,[30] although it is more often applied in National Labor Relations Act contexts.[31] The test is applied in National Labor Relations Act cases because Congress, reacting adversely to prior decisions of this Court, amended the legislation in 1947 so that general agency principles would be applied in distinguishing between employees and independent contractors.[32]

If general agency principles are held to be the sole determinant of Diggs' employment status, Diggs cannot be classified as an employee.[33]

The second test applied is the economic realities test. In *N.L.R.B. v. Hearst Publications, Inc.*,[34] this Court held that under the National Labor Relations Act, common law agency or control tests should not

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[30] *See, e.g., Smith v. Dutra Trucking Co.*, 410 F.Supp. 513 (N.D. Cal. 1976). This case, cited by Diggs in her brief, states that nothing in the legislative history of Title VII indicates a Congressional intent to construe the term "employee" in any manner other than in accordance with common law agency principles. Diggs has not cited any circuit level authority purporting to apply this test as the sole test to be applied in determining employee status under Title VII.

[31] *See e.g., N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968).

[32] *Id.*, at 256.

[33] *See, e.g., Hale v. Sheikholeslam*, 742 F.2d 1205 (5th Cir. 1984), a medical malpractice case in which the court held that a physician with staff privileges was an independent contractor, selected by the patient, and having no employer-employee, principal-agent, or similar legal relationship to the hospital. *See also Jeffcoat v. Phillips*, 534 S.W.2d 168, 173 (Tex. Civ. App. -- Houston 1976, writ ref'd n.r.e.).

[34] 322 U.S. 111, 128 (1944).

be applied in determining the existence of employment relationships. Instead, an employment relationship should be found to exist if the economic facts of the relationship make it more nearly one of employment than one of independent business enterprise with respect to the ends sought to be accomplished by the legislation. In *United States v. Silk,*[35] this Court applied the economic realities test to Social Security Act cases. In *Rutherford Food Corp. v. McComb,*[36] the Court applied the economic realities test to Fair Labor Standards Act cases. In *Bartels v. Birmingham,*[37] the Court restated the test for Social Security Act purposes, stating that ". . . [I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service."[38]

Because the economic realities test is amorphous and does not exclude consideration of common law control and agency factors, one cannot meaningfully distinguish between the pure "economic realities" test and the third test applied in Title VII cases to determine employee status: the hybrid "economic realities/common law control" test applied by the Fifth Circuit in this case.[39]

As a matter of economic reality, Diggs was not an employee of Harris. She did not render service *to*

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[35] 331 U.S. 704, 713 (1947).

[36] 331 U.S. 722 (1947).

[37] 332 U.S. 126 (1947).

[38] *Id.* at 130.

[39] *Diggs v. Harris Hospital-Methodist, Inc., supra,* 847 F.2d at 272. *See also Spirides v. Reinhardt,* 613 F.2d 826, 831 (D.C. Cir. 1979).

Harris. Instead, she used the hospital facilities if and when it served her purpose in treating specific patients. She was not in any way comparable to the newsboys in *N.L.R.B. v. Hearst Publications, Inc.*, who worked continuously and regularly as a part of the distribution chain through which the publisher circulated its papers, controlling buying and selling prices, dictating hours of work, and supervising the newsboys' sales efforts. Diggs cannot fairly compare herself to the coal unloaders in *United States v. Silk* who unloaded coal from railroad cars and delivered it to the Albert Silk Coal Co. with little opportunity for profit other than for the manual labor they performed, or to the slaughterhouse boners in *Rutherford Food Corp. v. McComb* who performed what was, in effect, a specialty job on an assembly line and were paid on what amounted to a piecework basis. Diggs was and is, from an economic point of view, an entrepreneur performing medical services for her patients on an independent contract basis, with the amount of her profits depending upon her skill and initiative, not on any employer's assignment of work to her.

Diggs was not dependent upon Harris. At the same time she applied for staff privileges at Harris, she also applied for staff privileges at other area hospitals. She practiced at other hospitals and admitted no patients at Harris from February, 1983, through May, 1983. Although Diggs needed to have some hospital privileges in order to perform some of the medical and surgical procedures she desired to perform, she was not dependent upon any one of the various hospitals at which she practiced. To the extent that Diggs could be described as "dependent" upon Harris, she

was dependent only because other area hospitals had earlier terminated or suspended her privileges.

In short, Diggs was not a hospital employee disguised as an independent contractor. She was an independent contractor under the economic realities test and under the hybrid economic realities/common law control test applied by the Fifth Circuit in this case.[40]

In *Doe ex rel. Doe v. St. Joseph's Hospital,*[41] a divided panel of the Seventh Circuit held that it was not necessary for a physician whose staff privileges were terminated to show that she was an employee of the hospital in order to state a Title VII claim. That case, unlike the present case, was not tried on the merits and merely holds that the plaintiff stated a claim under Title VII. The case does not support the proposition that the physician was an employee of the hospital, but instead suggests the existence of an amorphous Title VII claim for interference with employment opportunities.[42]

Because Diggs failed to prove that she was an employee of Harris, she contends in the alternative that

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[40] For other cases holding that physicians having voluntary staff privileges are not properly classified as employees having the right to bring Title VII suits, *see Nanavati v. Burdette Tomlin Memorial Hospital,* 42 B.N.A. F.E.P. Cas. 197 (D. N.J. 1986); *Amro v. St. Luke's Hospital,* 39 B.N.A. F.E.P. Cas. 1574 (E.D. Pa. 1986); *Beverley v. Douglas,* 591 F.Supp. 1321 (S.D. N.Y. 1984).

[41] 788 F.2D 411 (7th Cir. 1986).

[42] *See also Pao v. Holy Redeemer Hospital,* 547 F.Supp. 484 (E.D. Pa. 1982) (holding that the plaintiff stated a claim under Title VII in alleging that the hospital, in denying staff privileges, deprived him access to prospective patients who were his ultimate employers).

she was employed by her patients and that Harris, in terminating her staff privileges, interfered with her employment opportunities. Title VII, however, does not state that it is an unfair labor practice for an employer to interfere with the employment opportunities of persons who have never been employed or sought employment with the employer. Unlawful interference with employment opportunities may constitute a tort, or it may constitute a violation of other civil rights laws, but unlawful interference with employment opportunities does not constitute an unlawful employment practice within the Congressional definitions of that term.[43]

The cases cited by Diggs in support of an expansionist reading of Title VII rely upon the statutory provision that it is an unlawful employment practice for an employer to discriminate against any individual *with respect to terms, conditions, or privileges of his employment.* These cases are in conflict with this Court's statement in *Hishon v. King & Spalding*[44] that the refusal to hire someone does *not* concern the "terms, conditions, or privileges of employment."[45] It is the contractual relationship of employment which triggers the provision of Title VII governing the "terms, conditions, or privileges of employment."[46] Therefore, that provision has nothing to do with interference by non-employers with an individual's employment opportunities with third parties.

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[43] 42 U.S.C.A. §§ 2000e-2 and 2000e-3 (1981).

[44] 467 U.S. 69 (1984).

[45] *Id.* at 74, n. 5.

[46] *Id.* at 74.

Furthermore, the notion that physicians are employed by patients for Title VII purposes is also wrong.[47] To begin with, patients do not exercise the kind of control over physicians which would result in classification of the patient as an employer under the common law control test. Malpractice lawyers would find quite novel the notion that the patient, as "employer" of a physician, should be liable to himself for the injuries inflicted as a result of the negligent conduct of his physician-servant. As a matter of economic reality, physicians are not dependent upon the patients they serve except to the extent that physicians without patients will not receive revenues for professional services rendered.

Title VII, moreover, has a special, limited definition of the words "employer" and "employee." An employer, to be a Title VII employer, must employ at least 15 employees.[48] An employee, to be a Title VII employee, must be employed by a Title VII employer who employs at least 15 employees.[49] These definitions, which serve the function of limiting Title VII's reach, negate the notion that individual patients should be considered as "employers" of physicians. A physician providing services to hundreds of individual patients is not the servant of any of them, and Congress, in enacting Title VII, did not intend that those patients who happen to employ 15 or more employees

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[47] Dr. Garrett, one of Diggs' witnesses, specifically stated that he did not consider himself to be an employee of his patients. TR 3:42.

[48] 42 U.S.C.A. § 2000e(b) (1981).

[49] 42 U.S.C.A. § 2000e(f) (1981).

in their businesses be classified as employers of the physicians they consult for their personal needs.[50]

The Fifth Circuit correctly ruled that Diggs failed to prove the existence of an employment relationship with which Harris allegedly interfered. Diggs' right to relief, if any, did not arise under Title VII. Diggs was not and is not entitled to seek Title VII remedies.[51]

CONCLUSION

For the reasons stated above, Harris respectfully submits that Diggs' Petition for Writ of Certiorari should be denied.

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[50] Diggs made no attempt to prove that any of her patients employed 15 or more employees.

[51] Harris states no opinion as to whether or not Diggs would have had standing to seek relief under other theories.